IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

P. L. FLANIGAN,
Petitioner,

vs.

THE COUNTY OF SIERRA,
Respondent.

Petition for a Writ of Certiorari requiring the Circuit Court of Appeals for the Ninth Circuit to Certify to the Supreme Court for its Review and Determination that Certain Cause Entitled "P. L. Flanigan, Plaintiff in Error, vs. The County of Sierra, Defendant in Error."

To the Honorable the Supreme Court of the United States:

The petition of P. L. Flanigan respectfully shows unto this Honorable Court as follows:

The respondent is a county of the State of California and is a body politic and corporate under the laws thereof.

During the month of May, 1900, under and by virtue of that certain act entitled "An Act to estab- "lish a uniform system of county and township gov- "ernments." (Cal. Stats., 1897, Ch. CCLXXVII), commonly known as "The County Government Act," the Board of Supervisors of that county had power "To license for regulation and revenue, all and every "kind of business not prohibited by law, and trans- "acted and carried on in such county, and all shows, "exhibitions, and lawful games carried on therein, "to fix the rates of license tax upon the same, and "to provide for the collection of the same, by suit "or otherwise." (Sec. 25, subd. 25).

Upon the 31st day of May, 1900, the Board of Supervisors duly enacted an ordinance which is in part as follows:

"Section 1. Each and every person, copartner- "ship, firm or corporation, engaged in the business "of raising, grazing, herding and pasturing sheep "in the County of Sierra, State of California, must "annually procure a license therefor from the "License Collector, and must pay therefor the sum "of ten (10) cents for each sheep or lamb owned by, "in the possession of, or under the control of such "person, co-partnership, firm or corporation, and "used in such business in said county.

"Section 2. Each and every person, co-partner- "ship, firm or corporation who may engage in the "business of raising, grazing, herding or pasturing

"sheep within the County of Sierra, State of Cali-
"fornia, in order to procure a license therefor, must
"present to the License Collector of said county, at
"the time of making application therefor, the affi-
"davit of such owner, his foreman, agent or person
"in charge of such sheep owned by and in the pos-
"session of and under the control of such applicant
"for license within said county, and upon presenting
"such affidavit and the payment of the license tax,
"as prescribed in Section 1 of this ordinance, the
"applicant shall be granted a license to raise, graze,
"herd or pasture sheep within the said County of
"Sierra. * * *

"Section 4. All licenses to be collected under
"this ordinance are payable annually, and shall be-
"come due and payable in advance at the office of
"the License Collector, and if any license is not paid
"within fifteen days after the commencement of said
"business an additional tax of ten per cent is hereby
"added, to be collected with the original
"amount. * * *

"Section 7. The amount of the license tax fixed
"by this ordinance for the transaction or carrying
"on any business named herein shall be deemed a
"debt due to the County of Sierra, and if any per-
"son fails, neglects or refuses to take out and procure
"a license issued under the provisions and in the
"manner provided in this ordinance, the said License
"Collector shall direct the District Attorney of said

"county to bring suit in the name of the County of "Sierra for the recovery of such license * * * "and in case of recovery by the plaintiff fifty dollars "damages and costs must be added to the judgment "to be collected from the defendant.

"Section 8. The License Collector shall issue "licenses for the year in which said license is pro- "cured and out of each license collected by him he "may retain for his fee therefor the sum of 10 per "cent thereof which said fee shall belong to "him. * * *

"Section 10. All money collected for licenses "under the provisions of this ordinance, less said fee "of 10 per cent, shall be paid over to the County "Treasurer, as other moneys are and be placed to "the credit of the general funds of the county."

Your petitioner is a citizen of the State of Nevada, and during the months of May and June of the year 1900 was engaged in the business of raising, grazing, herding and pasturing sheep in the county of Sierra, and had in his possession and under his control some 25,000 sheep.

Your petitioner did not procure a license and did not pay the tax, as required by that ordinance.

An action under and by the authority of that ordinance, to recover the sum of $2,500 the amount of such unpaid tax and for the additional sum of $50 by way of damages was commenced upon the 25th day of June, 1900, in the Superior Court of the State

of California, in and for the County of Sierra, by the respondent against your petitioner.

Thereupon the respondent filed a complaint in said action alleging the matters and things hereinbefore recited and praying for judgment in the amount of said sums and for its costs.

Upon the 8th day of August, 1900, an order was duly made and entered removing such cause into the United States Circuit Court, Ninth Circuit, Northern District of California.

Thereafter, and on the 16th day of August, 1900, your petitioner filed a demurrer to said complaint in said Circuit Court averring that said complaint did not state facts sufficient to constitute a cause of action against your petitioner.

Your petitioner further shows that by an act of the Legislature of the State of California, approved on the 23d day of March, 1901, (Cal. Stats., 1900, Chap. CCIX, p. 635) there was added to the Political Code of the State of California a new section numbered 3366, which provided as follows:

"Boards of Supervisors of the counties of the "State, and the legislative bodies of the incorpo- "rated cities and towns therein, shall, in the exer- "cise of their police powers, and *for the purpose of* "*regulation,* as herein provided, *and not otherwise,* "have power to license all and every kind of busi- "ness not prohibited by law, and transacted and "carried on within the limits of their respective

"jurisdictions, and all shows, exhibitions and law-
"ful games carried on therein, to fix the rates of
"license tax upon the same, and to provide for the
"collection of the same by suit or otherwise."

Thereafter upon the argument of the demurrer to the complaint it was contended on behalf of your petitioner that by reason of the repeal effected by the act of 1901, of the power to license for revenue conferred upon Boards of Supervisors by the County Government Act, the respondent could not maintain its action. But upon the 25th day of November, 1901, the Circuit Court overruled the demurrer with leave of your petitioner to answer within twenty days. Your petitioner did not so answer and upon the 7th day of March, 1902, judgment by default was entered against your petitioner and in favor of the respondent as prayed for in the complaint.

Thereafter, and upon the 4th day of April, 1902, your petitioner upon filing his assignment of errors in this cause petitioned the Circuit Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the Ninth Circuit and thereupon such order was made and entered in and by the Circuit Court.

Thereafter upon the 5th day of May, 1902, such writ of error issued to the judges of said Circuit Court and pursuant thereunto the record and all proceedings had in said cause were duly certified

under the seal of said Circuit Court unto the Circuit Court of Appeals for the Ninth Circuit.

Thereafter upon the 14th day of October, 1902, the said writ of error came on regularly for hearing and determination in and by said Circuit Court of Appeals and was submitted for its decision and upon the 4th day of March, 1903, said Circuit Court of Appeals duly gave, rendered and filed its decision and judgment thereon affirming the judgment of the Circuit Court.

Within due time thereafter your petitioner made and filed in said Circuit Court of Appeals a petition for a rehearing of said writ of error and upon the 27th day of May, 1903, said Circuit Court of Appeals duly made and entered its order denying such petition.

And now your petitioner respectfully shows and submits unto this honorable Court the following reasons why he deems himself aggrieved by the judgment of said Circuit Court of Appeals and why a writ of certiorari should issue out of this Court to review said judgment:

That this is a case of "peculiar gravity and gen-"eral importance" in which this Court has said that the writ of certiorari will issue (*American Construction Company* vs. *Jacksonville Railway,* 148 U. S., 372, 83) is apparent, for its decision affects the revenues of the counties of the entire State and the obligations of the public, engaged in certain

classes of business to the counties. It affects the power of the State in its regulation of the counties.

And furthermore, as will be hereafter shown, there is a square and irreconcilable conflict between this decision and the decisions of the State Supreme Court upon an identical question, the mere suggestion of which has always been considered sufficient to invoke the extraordinary assistance of this Court by writ of certiorari; for since a lack of uniformity in the decisions of these tribunals must necessarily produce great doubt, there is no function of this Court of more importance than that of harmonizing such conflicts. And this is especially true in the case at bar, for if the judgment therein be allowed to stand, the county may by the process of a Federal Court, in cases where said Court has jurisdiction, enforce the payment of a claim, when, as will be shown, the State, from which the county derives its being, functions and powers, has denied it the assistance of its Courts or process to enforce such claim. The case at bar involves a question of State polity, of local regulation and the power of taxation for governmental purposes. Its facts in a peculiar manner emphasize the confusion which must necessarily arise if the decision be allowed to stand beside those of the State Court.

As was said in *Forsyth* vs. *Hammond* (166 U. S., 506). "We reaffirm in this case the proposition "heretofore announced, to wit, that the power this

"Court in certiorari extends to every case pending "in the Circuit Court of Appeals, and may be exer- "cised at any time during said pendency, provided "the case is one, which but for this provision of the "statute would be fully determined in that Court. "And further, that while this power is coextensive "with all possible necessities and sufficient to secure "in this Court a final control over the litigation in "all the Courts of Appeal, it is a power which will "be sparingly exercised, and only where the circum- "stances of the case satisfy us that the importance "of the question involved, the necessity of avoid- "ing conflict between two or more Courts of "Appeal and the Courts of a State or some mat- "ter affecting the interests of this nation in its in- "ternal or external relations demands such exer- "cise."

And your petitioner further shows wherein a conflict exists between the decisions of the Supreme Court of the State of California, and the decision of the Circuit Court of Appeals in the case at bar.

The Supreme Court of the State of California in "*Ex parte Pfirrmann*" (134 Cal. 143) in its opinion filed upon the 11th day of September, 1901, say in part: "Prior to the act of 1901, Boards of Super- "visors, by virtue of subdivision 25 of Section 25 of "the County Government Act, possessed the power "to collect a license tax for revenue in all parts of "the county. But the act of 1901 must be held to

" repeal by implication, the power thus granted. The " later act provides: 'Boards of Supervis- " 'ors * * * * shall in the exercise of their " ' police powers, and for the purpose of regulation, " ' as herein provided, and not otherwise, have power " ' to license all and every kind of business,' etc. " This language is too plain to be construed. It " speaks for itself, and declares that Boards of Su- " pervisors may issue licenses for the purposes of " regulation alone. The words ' not otherwise' cur- " tail and cut off all power Boards of Supervisors " theretofore had to issue licenses and charge there- " for as a revenue measure."

The ordinance by its very terms is a revenue, not a regulatory measure. The moneys derived from the license tax are not used for the purpose of regulating or policing the business licensed, but, less the 10 per cent deducted as the collector's fee, *" shall be paid " over to the County Treasury, as other moneys are, " and be placed to the credit of the general fund of " the county."*

In an Ohio case the Court say: "A license may " include a tax, or it may not. If the exaction goes "no further than to cover the necessary expenses of " issuing it, it does not, *but if it is made a means of " supplying money for the public treasury * * * " that it is a tax is too palable for discussion."*

Mays vs. *Cincinnati,* 1 Ohio St., 268.

The Circuit Court for the Eastern District of North Carolina say: "Defendants contend that this "taxation can be sustained as a part of the police "power of the State * * * If the legislation "in question can properly be referred to that power, "it will be because the right to pass inspection laws "may be deemed to have its foundation in the police "power of a State. Certainly if it be anything but "what the act itself seems to contemplate—a tax on "an occupation, or a privilege tax—it is because it "is used to secure an inspection of commercial fer-"tilizers before they can be sold in North Carolina. "Such a tax would be constitutional only within the "limits of the Constitution. It cannot be sustained "where evidently in excess of what is required for "such purpose, *and when the proceeds are applied to "other uses.*"

American Fertilizing Co. vs. *Board of Agriculture,* 43 Fed., 609.

See, also,

Flanigan vs. *Plainfield,* 44 N. J. L., 118.

Cooley on Taxation, 597.

That the purpose of this ordinance is to provide revenue for the county in the same manner as the ordinary tax levy, to be paid into the county treasury "as other moneys are," and to be expended for the general purposes of the county, is too palpable to admit of discussion; and on the other hand in no man-

ner does it regulate, even incidentally the business which it purports to license.

The Supreme Court of Utah in construing an almost identical ordinance say: "The ordinance does "not even contain a hint as to regulation of the busi- "ness, nor that the business requires any regulation, "nor that the county will afford protection of any "kind to the person engaged in the business, nor that "it is of such a character as to require regulation or "protection. The business may be conducted by "those engaged therein where and how they will. "No intention to regulate it is manifest from the "context or otherwise. This ordinance imposes no "restrictions as to the manner the business shall be "carried on, and grants no lawful privilege that was "not previously enjoyed."

Cache County vs. *Jensen,* 61 Pac., 303.

The Supreme Court of California has said in reference to an ordinance of similar character: "By "its very terms the ordinance is a revenue measure, "and this suit is simply a civil action to recover a "liability alleged to have been incurred by the de- "fendants by virtue of the provisions of the ordi- "nance, and the collection of a tax does not come "within the exercise of police power as a prohibitory "measure. That power is exercised in the enforce- "ment of a penalty prescribed for a non-compliance "with the law, or for the doing of some prohibited

"act. As the county has chosen by this ordinance "to require a license tax for engaging in certain "kinds of business, and that this tax shall be col- "lected by a suit, and has fixed no penalty for en- "gaging in the business, the ordinance is not to be "regarded as the exercise of its police power, but "rather as its desire to regulate the business and de- "rive a revenue therefrom."

Merced County vs. *Helm,* 102 Cal., 159, 163.

In Colorado the Court say: "While a license tax "may be levied upon such business or occupation "as are proper subjects of municipal regulation and "control, and the purpose of such tax is for regula- "tion or restraint, yet, when all the elements of regu- "lation or restraint are wanting, and the primary "purpose of the act is the raising of revenue only, "then it loses its character as a license tax, and be- "comes a tax for revenue. 'Only those cases where "'regulation is the primary purpose can be specially "'referred to the police power.' (Cooley on Tax- "ation, 397). For this reason the act under consid- "eration cannot be upheld as a legitimate exercise "of police power."

Kiowa County vs. *Dunn,* 40 Pac., 357.

And furthermore, it must be apparent that the word "license" as used in the title and body of this ordinance has in itself no virtue to give a regulatory

effect thereto. A license is a privilege to do an act or carry on a pursuit, the performance or transaction of which is forbidden without such special permission.

"A license is a right granted by some competent "authority to do an act which, without such author- "ity, would be illegal."

Cooley on Taxation, 573.

"A license confers a privilege, and makes the doing "of something legal, which, if done without it, "would be illegal."

Mayor vs. *Charlton,* 36 Ga., 460, 462.

"A license in its proper sense is a permit to do "business which could not be done without the "license."

Sonora vs. *Curtin,* 137 Cal., 583.

See, also:

Insurance Co. vs. *Augusta,* 50 Ga., 530, 537.
Burch vs. *Savannah,* 42 Ga., 596, 598.
Chilvers vs. *People,* 11 Mich., 43.
Robinson vs. *Mayor,* 1 Hump., 156.
Ould vs. *Richmond,* 23 Grat., 464.
Reed vs. *Beall,* 42 Miss., 472.

The so-called "license" of the ordinance when so tested is no license. It is but a tax receipt, and the so-called "license tax" merely a revenue tax. For

the ordinance does not forbid or make illegal the carrying on of the business mentioned unless a license be procured; it does not require that a license be procured as a prerequisite to lawfully engaging in the business. Its only provision is that sheepmen "engaged in the business" shall pay an annual tax and procure a "license" and if they fail to do so, the amount of the tax, with certain added penalties, shall be a debt due the county. This tax is to be collected by a civil suit, and when recovered the defendant has a perfect right to continue in the business whether or not he procures the "license" mentioned in Section one. The permission which is the very essential and synonym of license, is not a prerequisite to engaging in the business; the only demand of the county is that the tax shall be paid. The effect of the ordinance is not otherwise than if it had provided that all sheep owned by those engaged in this business, should be taxed ten cents a head; that upon the payment of the tax the owner should be entitled to a tax receipt evidencing such payment, and that if it were not paid, it should become a debt due the county to be collected by a civil suit. Calling the tax receipt a "license" and the tax a "license tax" does not confine the lawful authority to transact this business to those who have paid the tax and procured the "license" any more than an ordinary tax on property creates a right or authority to own prop-

erty. A license is a police regulation controlling the exercise of a profession, business or occupation.

As was said in *Cache County* vs. *Jensen, (supra)* "License, in common parlance, implies permission "to do something which may not be done without "a license. * * * A mere tax imposed upon a "business or occupation therefore, is not a license or "privilege as to the business which would not other-"wise exist. * * * Evidently the efforts of the "Board resulted not in the imposition of a license "upon a business, but in the levy of an unequal and "unjust tax upon property. The thing provided for "by this instrument is not a license * * * but "by design a prohibitive tax."

In *Mayor* vs. *Second Avenue R. R.,* (32 N. Y., 261) the Court say: "Regulations of police are "regulations of internal or domestic government for-"bidding some things and enjoining the perform-"ance of others for the security and protection and "to promote the happiness of the governed. The "only act enjoined by the ordinance in question is "the payment of the fifty dollars, and the only act "which it forbids and prohibits is the running of the "cars without the payment of the money. If the "Legislature should by law require every head of "a family throughout the State to pay to the collec-"tor the sum of twenty dollars, and take his receipt "therefor, it would be a fiscal measure, an ex-"pedient to replenish the treasury, not a regulation

"of police prescribing a rule of action and conduct. "So with this ordinance, call what it requires by the "name of license, or certificate of payment, or any- "thing else; its primary and indeed only purpose is "to take from the company under coercion of the "penalty which it imposes, the sum of fifty dollars "annually for each car run upon the road, for the "benefit of the city.

"The certificate which the company is to receive "upon payment being made is called a license in the "ordinance.* * * It is vain, therefore, to speak "of it or treat it as a license, or a regulation of "police. It is the imposition of an annual tax upon "the company."

Since, then, this ordinance was enacted solely as a revenue measure and since under the law of California as it stands to-day, the Board of Supervisors of the county respondent is divested of authority to enact the ordinance and it stands repealed, the question is presented: What is the effect of the repeal upon the right of the county to maintain this action instituted before the repeal? The Supreme Court of California, the Court of last resort, has directly passed upon this question in two cases decided before the decision of the Circuit Court of Appeals in this cause.

In *City of Sonora* vs. *Curtin,* 137 Cal., 583, that Court decided although under the terms of the ordinance of that city, a license tax was due and payable,

before the enactment of the repealing act, and nothing was left to be done except to collect the same, that the repealing act abrogated the right of collection.

In that case the Trustees of the City of Sonora had passed an ordinance on June 4, 1900, providing that any person engaged in any pursuit therein named, should obtain a license therefor; that attorneys-at-law should pay three dollars per quarter, and that "the license imposed thereunder" should be deemed a debt due the city payable in advance, and if such license should not be paid it might be recovered in a civil action, with an additional penalty of ten dollars.

The Court in part say: "Defendant was at the "time of the passage of the ordinance, an attorney at "law, admitted and licensed to practice in all the "Courts of the State, and he was then engaged, and "continued thereafter to be engaged in the practice "of law in the City of Sonora within the territory "covered by said ordinance. He neglected and re-"fused to procure a license under said ordinance, or "to pay the license tax imposed by its terms.

"Plaintiff is a municipal corporation of the sixth "class incorporated under an Act of the Legis-"lature entitled, 'An Act to provide for the "'organization, incorporation, and government "'of municipal corporations,' approved March "13, 1883 (Stats., 1883, p. 93). The author-

"ity for passing the ordinance is claimed un-
"der subdivision 10 of Section 852 of the Act, which
"was in force at the time of its passage, and which
"provides that Boards of Trustees of Municipal
"Corporations of the sixth class shall have power
"'to license for purposes of regulation and revenue,
"'and every kind of business authorized by law and
"'transacted or carried on in such city or town
"'* * * to fix the rates of license tax upon the
"'same, and to provide for the collection of the
"'same by suit or otherwise.' If it be conceded that
"the practice of law is a 'business authorized by law
"'and transacted or carried on in such city or town,'
"within the meaning of the statute, and that the pro-
"vision, 'Every attorney at law shall pay a license
"'of three dollars a quarter,' is a provision for a
"license tax upon the business of practicing law, and
"not upon the person because he is an attorney at
"law, is it a license tax imposed for the purpose of
"revenue, or is it a regulation under the police
"powers of the town? It is well settled that a busi-
"ness or occupation may be taxed, under authority
"to tax for the purposes of revenue, and in such cases
"the tax is properly a license tax. A license in its
"proper sense is a permit to do business which could
"not be done without the license. It is evident that
"the license tax imposed by the ordinance in ques-
"tion is not a license in the sense of a permit to de-
"fendant to practice law, because he already has a

"license, and has paid the fee therefor, which per-
"mits him to practice law. Although a business,
"occupation or profession may be thus licensed, by
"having a license issued which permits the business
"to be carried on, still it may under a proper
"statute, be subject to an additional license tax. Now
"the defendant here having obtained his license,
"which permits him to practice law, the ordinance
"in question could not take away that license or per-
"mit because of the refusal to pay the license tax.
"The ordinance, therefore, plainly by its terms im-
"posed the charge as a license tax. It is called in
"the ordinance a license tax, and it is therein said
"the license tax shall be deemed a sum due the city.
"The tax was not imposed as a police regulation. A
"police regulation or restraint is for the purpose of
"preventing damage to the public or to third per-
"sons. * * *

"The Board of Trustees of a city * * * can-
"not in any way or manner regulate the business or
"profession of practicing law. If it possessed any
"power to pass the ordinance in question it was un-
"der the power to license for the purposes of rev-
"enue. Since the ordinance was passed, the Legis-
"lature, by an Act approved March 23, 1901,
"(Statutes and Amendments to the Codes, 1901, p.
"635), added Section 3366 to the Political Code,
"which so far as material here, is as follows:
"'Boards of Supervisors of the counties of this State,

"'and the legislative bodies of the incorporated cit-
"'ies and towns therein, shall, in the exercise of their
"'police powers, and for the purposes of regulation,
"'as herein provided, and not otherwise, have power
"'to license all and every kind of business not pro-
"'hibited by law, and transacted and carried on
"'within the limits of their respective jurisdic-
"'tions * * * to fix the rates of license tax
"'upon the same, and to provide for the collection
"'of the same by suit or otherwise' * * *

"The section of the act of 1883 herein quoted giv-
"ing to the Board of Trustees power to license for
"purposes of revenue is repealed by implication by
"said Section 3366 of the Political Code. It de-
"clares and limits the power of the Board to license
"for the purpose of regulation in the exercise of
"their police powers. The words 'not otherwise'
"are used to emphasize the meaning of the sec-
"tion. * * *

"The action is not to recover upon any contract
"obligation. If recovery can be had, it is upon the
"theory that defendant has violated the law. The
"violation of the law is measured in dollars, and the
"amount for its violation is authorized to be recov-
"ered in a civil action. The defendant does not owe
"for any license, because he refused to take out a li-
"cense. The recovery is sought for his refusal. The
"authority under which the ordinance for revenue
"purposes was passed being repealed, the ordinance

" is repealed as to all such purposes, and must be re-
" garded as if it never existed, except for the pur-
" poses of those actions which were commenced,
" prosecuted and concluded while it was an existing
" law.

" The ordinance here in question provided that
" the three dollars ' together with the sum of ten
" ' dollars thereto added after the expiration of said
" ' ten days, shall become in each and every instance
" ' of delinquency, as aforesaid, the license tax as im-
" ' posed by this ordinance.'

" The right is given by the ordinance to bring a
" civil suit to recover the amount so made a license
" tax. The civil remedy was created by the ordi-
" nance, and the remedy is repealed by the repeal of
" the ordinance as to revenue. * * *

" The right given the plaintiff in this case, being
" penal in its nature, and the remedy created solely by
"statute, its enforcement is dependent on the statute
" alone. It is still inchoate and not reduced to pos-
" session nor perfected by final judgment. In such
" case the repeal of the statute destroys the remedy,
" unless the repealing statute contains a saving
" clause. * * * There is no saving clause in
" Section 3366 of the Political Code."

And again in *Santa Monica* vs. *Guidinger* (137 Cal., 658) the Court say: " From the title of the
" ordinance, the absence of regulatory provisions, the
" amounts of the several taxes imposed, and the na-

"ture of the particular subject of taxation involved "here, it is clear that the license tax in question was "imposed for the purpose of raising revenue. The "case is therefore substantially similar to that of the "*City of Sonora* vs. *Curtin* (*ante* p. 583), just de- "cided, and it must therefore be held on the author- "ity of the decision in that case that the license tax "in question was repealed, and the right of action "therefor extinguished by Section 3366 of the Polit- "ical Code."

But the Circuit Court of Appeals decided in diametric opposition to the Supreme Court of California, as to the effect of the enactment of the repealing act, upon the pending action. They say in part:

"*The Supreme Court of California has held that "Section 3366 repeals, by implication, the prior act "of 1897, in so far as the same relates to the power "to collect a license tax for revenue, thus restrict- "ing the licensing power of Boards of Supervisors, "under the act of 1897, to matters of regulation "alone.* (*Ex parte Pfirrmann*, 134 Cal., 143, 147-8; "*City of Sonora* vs *Curtin*, 70 Pac., 674; *Town of "Santa Monica* vs. *Guidinger*, 70 Pac., 732.)

"What effect does this repealing act have upon "the present action which was brought under the "provisions of the law of 1897, before it was re- "pealed?

"Counsel for plaintiff in error contend, that in- "asmuch the law under which the ordinance for

" revenue purposes was passed, has been repealed,
" the ordinance is repealed as to all such purposes,
" and must be regarded as if it never existed except
" for the purposes of those actions which were com-
" menced, prosecuted and concluded while it was ex-
" isting law, and rely upon *the rule announced in*
" *many authorities, that where the right and remedy*
" *is given by statute to bring a civil action for the*
" *collection of a license tax, the repeal of the statute*
" *destroys the remedy unless the repealing statute*
" *contains a saving clause.* * * *

" This principle has been applied more frequently
" to penal statutes and it may be regarded as an es-
" tablished rule that the repeal of a penal statute
" without any saving clause has the effect to deprive
" the Court in which any prosecution under the
" statute is pending of all power to proceed further
" in the matter, and in such cases the proceeding
" will be arrested at the very point where it is at the
" time of the repeal, because: 'The repeal of the
" 'law imposing the penalty is of itself a remis-
" 'sion.'

" The ordinance under discussion was adopted
" May 31, 1900; it went into effect fifteen days there-
" after. This action was commenced June 25, 1900.
" The amendment to the Code, Section 3366, was
" approved March 23, 1901. The judgment in this
" case was entered March 7, 1902. Under these cir-
" cumstances does it necessarily follow that because

"a saving clause was not inserted, the act of 1901 "should be given a 'retrospective operation?' Does "this question not depend upon the circumstances "and conditions of each particular act, its nature "and character? In the present case the transaction "between the parties, under the ordinance of 1900, "was closed; nothing was left to be done except to "collect the license due which was authorized by "law then in force. Upon the facts of this particular "case can it be said that it was the intention of the "Legislature by its passage of the act of 1901 to an- "nihilate the cause of action provided for in the act "of 1897, and terminate all pending suits of its en- "forcement, or was it simply to take away the power "of the Board of Supervisors in the future to license "for revenue only? * * *

"The defendant in error contends that the license "fee or tax, after the preliminary steps taken for its "collection, became a debt (and it is so expressly de- "clared to be in the ordinance in question); and "that it had a vested right to collect the same. It "has frequently been held that a direct tax duly as- "sessed and levied upon real or personal property, "is not a debt within the broad meaning of that term. "But a license fee or tax does not stand upon the "same plane. It is true that a vested right is usually "based upon contracts, but it may also be based upon "transactions in the nature of a contract.

"In Sutherland on Stat. Const., Sec. 164, the au-

" thor said: 'When a right has arisen on a contract,
" 'or a transaction in the nature of a contract au-
" thorized by a statute, and has been so far perfected
" 'that nothing remains to be done by the party as-
" 'serting such right, the repeal of the statute will not
" 'affect it or an action for its enforcement. It has-
" 'become a vested right which stands independently
" 'of the statute.' "

It is submitted with all respect for the decision of the Circuit Court of Appeals, that it does not harmonize with the decisions of the Supreme Court of California and that while expressly recognizing the existence and effect of these decisions, it arrives at a conclusion contradictory and antagonistic thereto, as may be readily seen by comparison.

Thus the Circuit Court of Appeals say: " This
" principle has been applied more frequently to
" penal statutes and it may be regarded as an estab-
" lished rule that the repeal of a penal statute with-
" out any saving clause has the effect to deprive the
" court in which any prosecution under the statute is
" pending of all power to proceed further."

And the Supreme Court say: "The right given
" the plaintiff in this case, *being penal in its nature,*
" and the remedy created solely by statute, its en-
" forcement is dependent upon the statute alone. It
" is still inchoate, and not reduced to possession nor
" perfected by final judgment. In such case the re-

"peal of the statute destroys the remedy unless the re-
"pealing statute contains a saving clause."

And again the Circuit Court of Appeals say: "The defendant in error contends that the license "fee or tax, after the preliminary steps taken for its "collection, became a debt. * * * It is true "that a vested right is usually based upon contracts, "but it may also be based upon transactions in the na-"ture of a contract."

And the Supreme Court say: "The action is not "to recover upon any contract obligation. If recov-"ery can be had, it is upon the theory that defendant "has violated the law. The violation of the law is "measured in dollars, and the amount of its vio-"lation is authorized to be recovered in a civil ac-"tion. The defendant does not owe for any license, "because he refused to take out a license. The re-"covery is sought for his refusal."

The Circuit Court of Appeals held that "the trans-"action between the parties, under the ordi-"nance of 1900, was closed" and "nothing was left "to be done except to collect the license due which "was authorized by the law then in force," but in *Curtin's* case in just the same manner the transaction between the parties was closed and nothing left to be done except to collect the license due which was authorizd by the law then in force. And the Supreme Court said that the ordinance *"must be re-"garded as if it never existed, except for the purposes*

" of those actions which were commenced, prosecut-
" ed and concluded while it was an existing law" and that the right of plaintiff in that case was *" still in-*
" choate and not reduced to possession nor perfected
" by final judgment."

The Circuit Court of Appeals say: "The plaintiff " in error did not directly promise to pay the license " tax demanded by the defendant in error, but he " herded and grazed his sheep in Sierra County " when the law for the imposition and collection of " the license tax was in full force and effect. He " reaped the full benefit of the law, and then refused " to comply with it." With respect to that Court it may be asked, What benefit did he reap? What benefit did the law confer on him? He was not accorded any protection or privilege thereby, which he did not have before its enactment. He could pay the tax and raise his sheep or he could raise his sheep and pay the tax. No right or privilege to raise sheep is conferred by the ordinance. His position was unaltered by its enactment, except that he was obliged to pay a tax. He has reaped no benefit; the county has accorded him no rights; no question of reciprocal obligations can arise.

But in the *Curtin* and *Guidinger* cases it might equally well be said that the defendants had "reaped " the full benefit of the law." Curtin was engaged in his profession, Guidinger was acting as a laundry agent "when the law for the imposition and collec-

tion of the license was in full force and effect." They reaped no benefit; they acquired no rights; they merely contracted an obligation, and the sovereign power of the state released them therefrom before its payment.

The case of *City of Oakland* vs. *Whipple* (44 Cal., 303), cited by the Circuit Court of Appeals in its opinion, it is respectfully submitted, is not in point. That was an action to recover delinquent taxes, but the right to levy those taxes had not been repealed, The right thereto, it is true, was founded solely on statute, but that statute was still in existence. The action was instituted under the provisions of the law then in force. (Cal. Stats., 1861, p. 419, Secs. 34-48.) While that action was pending a statute was enacted that before a certain date in each year the tax collector should complete and publish the delinquent list and then should proceed to collect the delinquent taxes. The defendant contended that the law under which that action was commenced was repealed and the plaintiff could not maintain its action. And the Court said, as cited by the Circuit Court of Appeals, "To hold that the act was intended to have a retro-"spective operation, so as to affect taxes which had "already become due, would be to hold that the "Legislature intended to remit all those taxes. A re-"sult so manifestly incompatible with the plainest "provisions of the Constitution, would not be in-"ferred, but must be made apparent by clear and un-

"equivocal language. That construction is not nec-
"essary in order to give full effect to the Act, and
"in our opinion it was not intended that the Act
"should have a retrospective operation; but the
"intent was that the taxes then due should be collect-
"ed according to the law then in force." There was no contention that the tax obligation had been remitted by the repeal—only that the law imposed certain conditions in the matter of preparation and publication of the delinquent list, precedent to the maintenance of the action and that by expiration of time within which those conditions could be performed as to the taxes of the prior year, the right to maintain the action was lost. But the Court said the statute is not retroactive; the action is to be prosecuted according to the law as it existed at the time of its institution. That case goes only to the effect of a repeal of a rule of procedure, not to the effect of the repeal of a right or remedy created and existing solely by statute. The language of the Court: "The taxes "then due should be collected according to the law "then in force" relates only to the *manner* of their collection, not to the *right* of collection, for the right had not been repealed and was still in force.

But even if the effect of this decision were such as the Circuit Court of Appeals has held, at least so far as it affects license taxes for revenue, it has been overruled by the cases last cited.

It is submitted that irrespective of the decisions of

the courts of other states and of their rulings on the effect of similar statutes, the decisions of the Supreme Court of California in the construction of a statute of that state must be read into that statute and conclusively control the Federal Courts in their determination of its object and effect.

Brown vs. *New Jersey*, 175 U. S., 172.
Noble vs. *Mitchell*, 164 U. S., 367.
Illinois Cent. R. Co. vs *Illinois*, 163 U. S., 142.
New York L. E. & W. R. Co. vs. *Pennsylvania*, 158 U. S., 431.
Leeper vs. *Texas*, 139 U. S., 462.
Missouri, K. & T. Ry Co. vs. *McCann*, 174 U. S., 580.
Cravens vs. *N. Y. Life Ins. Co.*, 178 U. S., 389.
Morley vs. *Lake Shore & M. S. Ry. Co.*, 146 U. S. 162.
Lapp vs. *Ritter*, 88 Fed., 108.
Southern Ry. Co. vs. *North Carolina Corp. Comm*, 99 Fed., 102.

Mr. Justice Harlan, said when on circuit in *O'Brien* vs. *Wheelock* (95 Fed., 883, 905): "The "federal courts, for the sake of harmony and to "avoid confusion, should 'lean towards an agreement "'of views with the state courts, if the question seems "'to them balanced with doubt,' and endeavor to

" avoid 'any unseemly conflict with the well-consid-
" 'ered decisions of the state courts' upon questions
" of local law. These considerations have peculiar,
" if not controlling weight, when the question to be
" determined relates to the jurisdiction or power,
" under the fundamental law of a state, of tribunals
" or bodies created by legislative enactment, and
" charged with the performance of public duties."

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the cause therein entitled *P. L. Flanigan, Plaintiff in Error,* vs. *The County of Sierra, Defendant in Error,* and numbered 832, to the end that the said cause may be reviewed and determined by this court and that the said judgment of the said Circuit Court of Appeals in the said cause be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

P. L. FLANIGAN,
Petitioner.

By J. C. CAMPBELL,
Attorney and Counsel for Petitioner.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA, } ss.
CITY AND COUNTY OF SAN FRANCISCO.

J. C. CAMPBELL, being first duly sworn, deposes and says: That he is the attorney and of counsel for P. L. Flanigan, the petitioner above named, and as such has had personal charge of the cause in the foregoing petition mentioned in the Circuit Court of the United States for the Northern District of California and in the United States Circuit Court of Appeals for the Ninth Circuit; that he has read the said petition, and that the facts therein stated are true to the best of his information and belief, and that this proceeding is not prosecuted for the purpose of delay.

J. C. CAMPBELL.

Subscribed and sworn to before me this.....day of August, 1903.

[SEAL] GEORGE F. HATTON,
Notary Public, in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL.

I hereby certify that I have carefully examined the foregoing petition and application for a writ of certiorari, and that in my opinion the same is well

founded and the case is one in which the prayer of the petitioner should be granted by this Court.

J. C. CAMPBELL,
Of Counsel for Petitioner.